91-1795

No. _____

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BRIAN PETER DANIELS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

J. WILLIAM BEARD, JR.
108 Ivy Street
San Diego, CA 92101
Telephone: (619) 239-8553

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1) Did the sentencing court make a sufficient record to justify an upward departure from the sentencing guidelines to allow a meaningful review of the legality of this sentence?

2) Did the sentencing court properly determine the base offense level?

3) Assuming, arguendo, that the sentencing court had a basis to depart upward, did the sentencing court consider inappropriate factors?

(a) Is the weight of the contraband properly considered as a basis for a departure for a violation of Title 21 U.S.C. 848(a)?

(b) Is interpolation a proper method to determine a base offense level for a violation of Title 21 U.S.C. 848(a)?

(c) Is Fuentes applicable to the instant case? [1]

(d) Did the District Court sufficiently consider petitioner's ability to pay a fine?

(4) Was petitioner improperly denied a two level reduction for acceptance of responsibility?

---

[1] United States v. Fuentes, 729 F.Supp. 487 (E.D.Va. 1989)

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i,ii
TABLE OF AUTHORITIES	iv, v, vi
OPINION BELOW	2
JURISDICTION	2
APPELLATE PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	9
1. The sentencing court failed to make a sufficient record of its finding to justify an upward departure from the sentencing guidelines	9
CONCLUSION	48

TABLE OF AUTHORITIES

CASES	PAGE
Supreme Court	
Garrett v. United States 471 U.S. 773 105 S.Ct. (1985)	30
Miranda v. Arizona, 384 U.S. 436 (1966)	38
Circuit Courts	
Schetz v. United States, 901 F.2d 85 (7th Cir. 1990)	25,26
United States v. Berberian, 767 F.2d 1324 (9th Cir. 1985)	38
United States v. Martinez 946 F.2d 100 (9th Cir. 1991)	17,22
United States v. Seminole, 882 F.2d 441 (9th Cir. 1989)	35, 36
United States v. Walker, 900 F.2d 1201 (8th Cir. 1990)	36
United States v. Watt, 910 F.2d 587 (9th Cir. 1990)	38,39,40,41,42
United States v. Wells, 878 F.2d 1232 (9th Cir. 1989)	10,11,12,34
District Courts	
United States v. Fuentes, 729 F.Supp. 487, (ED Va 1989)	16,30,31,32,33,34

CONSTITUTION

Fifth Amendment	3,38,42
Sixth Amendment	3,42

STATUTES

18 U.S.C. Section 624(c)	27
18 U.S.C. Section 3553(c)	10
18 U.S.C. Section 3742	10
18 U.S.C. Section 3742(e)	10
18 U.S.C. Section 3006A(f)(1982)	36
21 U.S.C. Section 846	5,31,33
21 U.S.C. Section 848	3,29,31
21 U.S.C. Section 848(a)	4,5,13,16,22,27
21 U.S.C. Section 848(b)	13,20,21,27,28
21 U.S.C. Section 963	5
28 U.S.C. Section 1254(1)	3

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. 1B1.4	25
U.S.S.G. 2A2.2	24
U.S.S.G. 2D1.5	15,21,26,27,28
U.S.S.G. 2D1.5(a)(1)	13,19,21,29
U.S.S.G. 2D1.5(a)(3)	13,19,20,29
U.S.S.G. 3E1.1	38,39,42,43,47
U.S.S.G. 5E1.2	35,36
U.S.S.G. 5E4.2	35
U.S.S.G. 5E4.2(d)(2)	35
U.S.S.G. 5K1.1	46

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BRIAN PETER DANIELS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, BRIAN PETER DANIELS, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed 13 December 1992. [2]*

---

[2] No other individuals a party to this petition.

* A Petition For Rehearing And Suggestion For Rehearing En Banc was denied 6 February 1992.

OPINION BELOW

On 13 December 1991, the Court of Appeals for the Ninth Circuit entered its opinion affirming the sentencing court's judgment, sentencing petitioner BRIAN PETER DANIELS to 300 months in custody and a $6,250,000.00 fine. Petitioner filed a Petition For Rehearing And Suggestion For Rehearing En Banc to the Ninth Circuit, which petition was denied and rejected by an order of the Ninth Circuit filed 6 February 1992. The Court of Appeals Memorandum Opinion of 13 December 1991 and Order denying and rejecting the petition for rehearing and suggestion for rehearing en banc filed 6 February 1992 are attached as Appendix "A" and Appendix "B" respectively.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgement on 13 December 1981. The same court denied petitioner's petition for rehearing and

suggestion for rehearing en banc on 6 February 1992. Jurisdiction of this court is invoked under Title 28, United States Code, Section. 1254(1).

APPELLATE PROVISIONS INVOLVED

The instant petition arises from an alleged violation of the United States Sentencing Commission Federal Sentencing Guidelines by the sentencing court and also involves violations of the Fifth and Sixth Amendment of the United States Constitution and statutory interpretation of Title 21 United States Code Section 848.

STATEMENT OF THE CASE

On 27 July 1988 an indictment against BRIAN PETER DANIELS and others was filed in the United States District Court for the Western District of Washington, at Seattle, case number CR 88-189. Thereafter, on 1 June 1989, a superceding indictment including BRIAN PETER DANIELS and others, was filed in the

United States District Court for the Western District of Washington at Seattle (hereinafter referred to as the "Seattle" case).

On 27 September 1988, an indictment was filed against BRIAN PETER DANIELS in the United States District for the Southern District of California (hereinafter referred to as the "San Diego" case).

On 13 September 1988, an indictment was returned against BRIAN PETER DANIELS and others in the United States District Court for the District of Nevada (hereinafter referred to as the "Reno" case).

All of the indictments concerned the defendant's participation in importing into the United States, marijuana from Thailand. The "Seattle" case involved a violation of Title 21 U.S.C. 848(a), whereas the "Reno" case and "San Diego" case involved either conspiracy to import and/or conspiracy to possess with intent to distribute the Thai

marijuana in those jurisdictions. The "Reno" case and "San Diego" case were "predicate acts" of the violation of Title 21 U.S.C. 848(a) charged in the "Seattle" case.

A plea agreement was entered into between petitioner BRIAN PETER DANIELS and the United States of America, wherein petitioner pled guilty in the "Seattle" case, to a violation of Title 21 U.S.C. Section 848(a), to a violation of Title 21 U.S.C. Section 963 in the "San Diego" case, and to a violation of Title 21 U.S.C. Section 846 in the "Reno" case. [3] The plea agreement provided that the defendant (hereinafter "petitioner") would be sentenced on the "Seattle" case for a violation of Title 21 U.S.C. Section 848(a) and that the sentence imposed upon the "Reno" Case and the "San Diego" case, would be

---

[3] The "Seattle" and "Reno" cases were guideline cases, however, the "San Diego" case was a pre-guidelines case.

concurrent to the sentence on the "Seattle" case, but not to exceed the sentence on the "Seattle" case. [4]

The parties stipulated to a statement of facts for the purpose of the guilty plea, which involved the admission of the conspiracy to, or importation of, approximately 200,000 kilograms of marijuana. [5] Judge Coughenour,

---

[4] It was understood by all parties and the court that the sentence on the "Reno" case under the guidelines could exceed the sentence on the "Seattle" case, and therefore, it was understood that the "Reno" case sentence may require a downward departure if the guidelines of the "Seattle" case were less than the "Reno" case.

[5] There was a plus or minus five percent weight dispute to which the sentencing Judge, Judge Cougenhour made a finding that the discrepancy would not be taken into account in sentencing. The petitioner stipulated and agreed to the agreed statement of facts which essentially set forth his activities during the period encompassed by the continuing criminal enterprise (Title 21 U.S.C. Section 848(a)).

after hearing arguments [6] initially sentenced the petitioner to a sentence on all three cases collectively of three hundred (300) months custody, $6,250,00.00 in fines, and a five (5) year supervised release. Defense counsel addressed the court and requested that the court sentence the petitioner on each case individually, rather than collectively, for the purposes of the record. The court then stated it was the court's finding that the sentencing guidelines on the "Seattle" case were 121 months to 151 months, and the sentencing guidelines for the "Reno" case were 262 months to 327 months.

The probation officer interrupted the court and reminded the court of the plea agreement, and that under the terms of the

---

[6] The government specifically asked whether argument regarding an upward departure should be addressed and the court stated "No" and Judge Coughenour not give any indication to the petitioner or his counsel that an upward departure was intended.

plea agreement, the sentence of 300 months would violate that agreement, given the court's findings.

The court then indicated without notice or further argument that it would depart upward on the "Seattle" case, and sentenced the petitioner to 300 months on the "Seattle" case with five (5) years supervised release, 300 months on the "Reno" case with five (5) years supervised release, and fifteen (15) years on the "San Diego" case, all the custodial time to be concurrent, however, a fine of the "Seattle" case was imposed of $2,000,000.00, a fine on the "Reno" case of $4,000,000.00, and the "San Diego" case $250,000.00 to run consecutive, making a total fine of $6,250,000.00. There were no specific facts given as to why the court was departing other than the statement that there were substantial assets outside the United States Government (to wit: property in Thailand) and

the reasons set forth in the presentence report which compelled such a lengthy sentence.

There were essentially five (5) separate and distinct rationales for a departure, each of which may have arrived at a different sentence, and different theory of the sentence imposed in the presentence report

The petitioner timely filed his notice of appeal on all three (3) cases to the Ninth Circuit, and thereafter, filed a motion to consolidate the appeals, which motion was granted by the Ninth Circuit on 12 December 1990 (Appendix "C").

REASONS FOR GRANTING THE WRIT

1. The sentencing court failed to make a sufficient record of its finding to justify an upward departure from the sentencing guidelines

The District Court's discretion in sentencing is constrained by the requirement of setting forth specific reasons for

departure. Id. at 1413, see also Sentencing Guidelines, Chap. 1, Part A, section 4(b) at 1.7-1.8; 18 U.S.C. 3553(c). While it is not set forth how specific the findings must be to support a departure from the guidelines, they must be sufficiently specific so that an Appellate Court can engage in a meaningful review, envisioned under 18 U.S.C. 3742 of the Act, which provides that a sentence should be set aside by the Appellate Court, if it departs unreasonably from the Guidelines' recommended sentence. United States v. Wells, 878 F.2d 1232, 1233 (9th Cir. 1989); 18 U.S.C. 3742(e) (West Supp.1989).

In Wells, the deferdant, a felon, plead guilty to possession of a firearm, and had a criminal history rating of IV. United States v. Wells, 878 F.2d 1232 (9th Cir. 1989). Based on those two factors, the guidelines required a sentencing range from (8) to (14) months. However, the District Court sentenced Wells to

twenty-four (24) months incarceration. Id. The Ninth Circuit in Wells, noted that the District Court insufficiently specified its reason to depart from the guidelines as follows:

> The Court concludes that the defendant's criminal history category significantly underrepresents the seriousness of the defendant's criminal history, and the seriousness of the defendant's criminal history more closely resembles that of a category VI criminal history ... .

Id.

The Ninth Circuit held, in Wells, the conclusory statement by the District Court was inadequate to permit a meaningful review of the departure in sentencing. Id. at 1233. In the instant case, there is no record of any specific reason for departing from the proper base level of (32) upward to (39), when the District Court determined appellant's sentence, other than the reference to adopting

the findings of the presentence report.[7]

The Court, in Wells, stated that the District Court must at least point to specific aspects concerning the defendant's behavior, which it believes have not been taken into account adequately by the Commission's guidelines, for determining the defendant's level for sentencing. United States v. Wells, 878 F.2d 1232, 1233 (9th Cir. 1989). The record, in the instant case, is resoundingly silent as to any specific aspect that would satisfy the requirement for meaningful review by this Court under Wells. The appellate court concluded that there was a basis for the departure specifically stated. However, the basis for the departure was merely a reference

---

[7]The final presentence report, in the instant case, gave multiple reasons for departure and was ambiguous as to exactly how the Court should find the base offense level. It is important to note that there was a "first draft" presentence report followed by an addendum, and finally, the final presentence report.

to the presentence report which in and of itself had at least four different "theories" and/or "means" of departure. The trial court never stated which "theory/means" the court adopted.

The appellate court reasoned that there was a basis for interpolation between 2D1.1(a)(1) and 2D1.5(a)(3) based upon quantities of contraband but, at the same time states that 2D1.5(a)(1) is the equivalent to 21 U.S.C. 848(a) and 2D1.5(a)(3) is the equivalent to 21 U.S.C. 848(b).

THE SENTENCING COURT IMPROPERLY DETERMINED THE BASE OFFENSE LEVEL

The court, all counsel, and the probation officer, all agreed that the base offense level for a violation of Title 21 U.S.C. 848(a), is a base offense level of 32 (Guidelines Section 2D1.5, effective November 1, 1987.) Based upon the total offense level of 32, and criminal history category of I, the

guideline imprisonment range is 121 to 151 months.

Although the District Court was to sentence the appellant on two other related cases, the "Reno Case" (case number CR(N)87-55-HDM), and the "San Diego Case" (case number CR-88-0773-JLI), the District Court adopted the plea agreement, which provided, as affirmed in the presentence report, "that any term of imprisonment imposed relative to the Southern District of California case, and the District of Nevada case, shall not exceed, and shall be served concurrently, with the sentence imposed relative to the Western District of Washington C.C.E. disposition."

When sentencing the appellant, the District Court announced that it adopted the "findings as amended by the stipulation of the parties, and those findings contained in the presentence investigation." The Court went on to state that "an appropriate offense level is

39." The appellant was sentenced to 300 months. The District Court found, "(t)he reason for the selection of the 300 months is as stated in the presentence report, and also, because the defendant, unlike his co-defendants, has amassed millions which are beyond the reach of the authorities."

THE COURT CONSIDERED INAPPROPRIATE FACTORS FOR AN UPWARD DEPARTURE

The presentence report, in the instant case, sets forth under "Factors That May Warrant Departure," five paragraphs discussing Section 2D1.5 (C.C.E.). The presentence report suggests that the Court should "interpolate" to justify departure based upon weight, or the gross receipts. Based upon the weight of 195,048 kilograms, the presentence report suggests that the base offense level is 39.[8]. Based upon the gross receipts, the

---

[8] This argument necessarily assumes that a level 32 CCE must involve up to zero pounds, and that any weight over zero pounds should be

presentence report states that the "interpolation" method justifies a base level of 38. The presentence report also makes reference to United States v. Fuentes, 729 F.Supp. 487 (ED Va 1989) as an apparent precedent to the departure calculations in the report.[9]

Accordingly, appellant addresses each of the above arguments given in the presentence report and sets forth the reasons why his sentence should be vacated by this Court.

(a) Weight is not properly considered as a basis for departure for a violation of 21 U.S.C. 848(a)

"interpolated" to raise the base level representing the percentage of the 300,000 kilograms required to raise the base offense level from 32 to 43 under 2D1.5. This argument, appellant maintains, is irrational. Further discussion of "interpolation" is presented in below argument.

[9] The court does not make reference to Fuentes, however, since the court adopted the findings in the presentence report, appellant addresses its applicability out of an abundance of caution.

The Court, in United States v. Martinez, supra, Judges Boochever, Kozinski and O'Scannlain, held that the court cannot depart upward based upon the quantity of drugs. The court held that the fact that the guidelines established ranges up to 50 kilograms of cocaine, and then a range for more than 50 kilograms, sufficiently took into account quantities. In that case the defendants had in excess of 430 kilograms which was the basis of the departure. The Martinez court (appellate) held that the guidelines for 50 or more kilograms, and the range therein, sufficiently took into account any amount of drugs in excess of the 50 kilograms.

In the instant case petitioner DANIELS had approximately 200,000 kilograms of marijuana, less than that governed by sub-paragraph 3, Section 2D1.5, of the 1987

Sentencing Guidelines. [10] The 1987 version of Section 2D1.5, provided for a base offense level of 32 which was also stipulated by all parties (Memorandum Opinion, page 3, first sentence of paragraph 1, sub-section B).

The trial court, Judge Coughenour, and

---

[10] The 1987 version of Section 2D1.5 provided:

Continuing Criminal Enterprise

(a) Base Offense Level:

(1) 32, for the first conviction of engaging in a continuing criminal enterprise; or

(2) 38, for the second or any subsequent conviction of engaging in a continuing criminal enterprise or

(3) 43, for engaging in a continuing criminal enterprise as the principal administrator, leader, or organizer if either the amount of drugs involved was 30 times the minimum in the first paragraph (i.e., the test corresponding to level 36) of the Drug Quantity Table or 300 times the minimum in the third paragraph (i.e., the text corresponding to Level 32), or the principal received $10 million in gross receipts for any twelve-month period.

the Appellate Court Chief Judge Wallace and Judges Hug and Rymer agreed that it was proper to depart to level 39 based upon (apparently) an interpolation between 2D1.5(a)(1) and 2D1.5(a)(3).

It is submitted that a departure cannot be from one offense level to another, but must be a departure as to a number of months. Departures to offense levels are incorrect.

The sentencing guidelines in effect at the time of the offense, allowed a base offense level of 32 for a first conviction of a Continuing Criminal Enterprise (hereinafter "C.C.E."), and a base offense level of 43 for a C.C.E. engaged as the principal administrator or organizer, if the amount of drugs involved was 30 times the minimum (300,000 kilograms of marijuana), or the principal received $10 million in gross receipts for any twelve-month period.

The appellate court determined that

2D1.5(a)(3), was analogous to 21 U.S.C. 848(b), and therefore, not a quantitative statement by the sentencing commission. This analysis fails for two major reasons (emphasis added).

Assuming arguendo that the sentencing commission intended 2D1.5(a)(3) to be the equivalent of 21 U.S.C. 848(b), it would be legally and theoretically incorrect.

Primarily, 2D1.5(a)(3) requires a finding by the court of ten times the amount of drugs required by the statute in 1987 for a legal factual finding of 21 U.S.C. 848(b). Secondarily, 2D1.5(a)(3) would suggest that if a defendant accepted responsibility for his acts and got the two point reduction, he would be allowed a level 41, which is less than a life sentence, which is prohibited by 21 U.S.C. 848(b). Therefore, it is illogical and inconceivable that the sentencing commission intended 2D1.5(a)(3) to be the same as 21

U.S.C. 848(b).

It is more logical that the sentencing commission in 1987, set forth specific factors to enhance a base offense level, giving the trial court's discretion over the government's plea bargaining process and any jury's finding to enhance a sentence based upon quantity of drugs and gross receipts, as well as the position of the alleged perpetrator.

This is entirely consistent with the theory of a C.C.E., being that it necessarily by definition would entail large scale transactions and monies. It is, and was no secret at that time, that the guidelines could produce an offense level lower than that obtained under Section 2D1.5(a)(1) and may be to the defendant's advantage to plead to the C.C.E. (see Federal Sentencing Law and Practice, section 2D1.5 (1989) Ed. "In some circumstances it may be to the defendant's advantage to plead to C.C.E. conviction rather

than an offense covered by section 2D1.1").

In United States v. Martinez, supra, the court clearly indicated if there was a consideration of the amount of contraband in the guidelines, that there should be no departure from the guidelines.

(b) Interpolation is not a proper method to determine a base offense level for a violation of Title 21 U.S.C. 848(a)

The general application principles, or "policy statements" to federal sentencing provide that the guidelines refer to three different types of departure approved by the sentencing commission. The first type "is in effect an interpolation between two adjacent, numerically oriented guideline rules." The Commission then proceeds to give an example of such a departure.

> A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than

> requiring a court to force middle instances into either the "serious" or the "simple" category, the guideline commentary suggests that the Court may interpolate and select a midpoint increase of three levels.

U.S.S.G. ch.1, pt. A Section 4(b), at 1.7 (1987).

A closer examination shows that the use of "interpolation" does not apply to the instant case. First, the policy statement does not provide for the interpolation of base offense levels. Petitioner respectfully submits that research does not reveal a single case where the base offense levels were interpolated. Second, the policy statement plainly states that interpolation applies to guideline rules which are numerically oriented not base offense levels. The Commission gave a specific example (aggravated assault) in which there was a base offense level and adjustments pursuant to the provided "specific offense

characteristic" separate and apart from the base offense level. Finally, application note 3. of "Aggravated Assault" states in no uncertain terms that interpolation applies to categories (e.g., specific offense characteristics) not base offense levels.

> If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate.

U.S.S.G., Section 2A2.2, note 3 (1987).

It is important to note that the Commission provided in its policy statement that, the Court should not be required to be "forced" into one category. Again, the plain reading of this portion of the policy statement indicates that the Commission did not mean the base offense level, but rather the specific offense characteristics that are provided in addition to the base offense level. Thus, in the instant case, the Court

is not forced into one category of specific offense characteristic verses another.

Section 1B1.4, "Determining the Offense Level", the Commission provides that the Court will (a) determine the base offense level from Chapter Two, (b) make applicable adjustments for specific offense characteristics from Chapter Two, (c) make Chapter Three adjustments, and (d) make applicable adjustments from Chapter Four. The policy statements make it clear that "interpolation" applies to subsection "(b)", adjustments for specific offense characteristics, which are determined after the base offense level. It is especially apparent that drug quantity interpolation is inappropriate when the only Federal Court to which interpolation was suggested was "puzzled" that the argument was advanced on appeal. See, Schetz v. United States, 901 F.2d 85, 87 (7th Cir. 1990).

The sentencing guidelines provide in

2D1.5 that a person convicted of a C.C.E. will be sentenced as follows:

(a) Base offense level:

1. 32, for the first conviction of engaging in a Continuing Criminal Enterprise; or

2. 38, for the second, or any subsequent conviction of engaging in a Continuing Criminal Enterprise; or

3. 43, for engaging in a Continuing Criminal Enterprise as the principal administrator, leader, or organizer, if either the amount of drugs involved was 30 times the minimum in the first paragraph (10,000 kilograms) of the drug quantity table or 300 times the minimum in the third paragraph (1,000 kilograms), or the principal received $10,000 million in gross receipts for any 12 month period. (emphasis added)

The presentence report, and the stipulation of the parties clearly shows that the maximum amount of marijuana attributable to appellant is approximately 200,000 kilograms. The presentence report shows the maximum amount of dollars attributable during a 12 month period is approximately $5 million dollars.

21 U.S.C. 848(b) provides for a life sentence, without possibility of parole, for its violation. The elements are essentially the same, except 848(b) only requires 30,000 kilograms of marijuana as an element, not 300,000 kilos.

When there exists no discretion at all, the guidelines are silent. See 18 U.S.C. 624(c).

Instead 2D1.5 does not talk of 848(b) at all. 2D1.5 provided for a situation where either by plea bargain, or jury conviction of 21 U.S.C. 848(a), where the Court can find from the facts that the defendant falls into level 43 (life sentence). But, even then, the defendant would be allowed consideration of acceptance of responsibility (two points). That would leave an adjusted offense level of 41 (less than life). Since this would not be possible to one convicted of 21 U.S.C. 848(b), it is obvious the commission never considered

848(b) when determining the base offense levels of 2D1.5.

Therefore, similar to the Schetz case, supra, there is no basis for interpolation. First, the commission considered quantities -- - up to 300,000 kilograms and over 300,000 kilograms. Second, the other criteria, i.e., principal administrator, etc., are different than the criteria in subsection 1, level 32.

It should be noted, the Government was well aware of the guidelines consequences, and that is evidenced by their assertion in the plea agreement, that the Government reserved the right to seek an upward departure. (emphasis added)

In order to conclude that "interpolation" is proper, and this is not conceded, the essential elements must be identical. 2D1.5 subsection 1 and subsection 3 have no basis of identity whatsoever. Interpolation, a true mathematical formula, would be reduced to an

impurity in the sentencing framework of 21 U.S.C. 848. If there is to be a departure, which is not conceded, interpolation is mathematically impossible, and philosophically unreasonable and irresponsible. Petitioner respectfully asserts that the Government suggests interpolation between the equivalent of "apples and oranges".

Although it is agreed that 2D1.5(a)(1) does not specifically state an amount of "contraband" necessary for the offense, it is submitted that a substantial amount of contraband would be required. Given that proposition, it is impossible for the probation office or Court to interpolate an unknown number to a known number (300,000 kilograms). Additionally, 2D1.5(a)(3), which calls for a base offense level of 43, requires that the individual be a principal administrator, leader, or organizer, which in no way can be interpolated into 2D1.5(a)(1),

as a factor.

(c) Fuentes is inapplicable to the instant case

In Fuentes, the defendant was convicted after an eight-day trial of conspiracy to possess and distribute in excess of five kilograms of cocaine, carrying on a C.C.E., and conspiracy to launder money, distribution of cocaine, possession with the intent to distribute cocaine, possession of cocaine, and money laundering. United States v. Fuentes, 729 F.Supp. 487 (E.D.Va. 1989). In that case, the Court was faced with the decision whether to leave the convictions for both a C.C.E. and conspiracy in light of the prohibition cumulative punishment. See, Garrett v. United States, 471 U.S. 773, 786, 105 S.Ct. 2407, 2415, 85 L.Ed.2d 764 (1985). In the instant case, Mr. DANIELS pled only to a C.C.E., unlike the case of in Fuentes resulting in multiple convictions. As such, the Court in

the instant case is not faced with the dilemma of cumulative sentencing.

The District Court in Fuentes settled on leaving the conspiracy conviction stand but merging the conspiracy count into the C.C.E. count. The Court indicated that its primary concern was that where there was a possibility that the C.C.E. conviction could be overturned after the conspiracy count had been vacated. The Court did not want the defendant to go unpunished for the conspiracy for which he had been convicted.

> At the same time, leaving the Section 846 conviction intact, but merged into the Section 848 conviction minimizes the risk that the defendant's criminal conduct will go unpunished if the Continuing Criminal Enterprise conviction is overturned for any reason not affecting the validity of the conspiracy conviction.

Id., at 492.

The Court, in Fuentes, went on to stress, again, the importance of the punishing the

defendant for his convicted offense.

> Any inherent punitive effect flowing from the continuing existence of the merged lesser-included offense conviction, even without a sentence, is outweighed by the interest in insuring that those convicted of serious crimes do not unjustifiably escape punishment. (emphasis added)

Id., at 493.

In sentencing, the Court in Fuentes explained why it was compelled to depart upward from the C.C.E. guideline range.

> [T]he guideline range fails to approach the statutory mandatory minimum sentence of 20 years for the Continuing Criminal Enterprise offense. This alone amply supports departure. (emphasis added)

Id., at 494.

These facts are readily distinguishable from the facts of the instant case in that appellant guideline range of 121 to 151 months clearly allows this Court to exceed the

statutory mandatory minimum of ten years.[11]

With respect to the Court's argument in Fuentes that the "incongruous" guidelines invites an upward departure from the guidelines range for a C.C.E. to "that prescribed for the Section 846 conspiracy", petitioner respectfully submits first that there is no conspiracy conviction in the instant case. Second, under the Ninth Circuit's analysis of proper departure, the "incongruous" guidelines are not a "factor" that the guidelines did not adequately take into consideration and thus may not be properly considered as a reason for departure by this Court.[12]

Finally, it is apparent that the Court in

---

[11]. To be sure, even if acceptance of responsibility two level reduction was granted, the guidelines, at level 30, would allow for the minimum mandatory 10 years in the guideline range of 97 to 121 months.

[12]. See below discussion and analysis of Ninth Circuit departure from guidelines.

Fuentes did not give a sufficient reason for departure. In part F, "Statement of Reasons for the Court's Sentence", the Court in Fuentes plainly stated that,

> (n)either the statutory mandatory minimum, nor a sentence within the Guidelines range for Continuing Criminal Enterprise conviction would accomplish (the goals of deterrence, retribution, incapacitation and rehabilitation.

Id., at 495.

In United States v. Wells, 878 F.2d 1232 (9th Cir. 1989), the Ninth Circuit held that a conclusory statement, without pointing to specific aspects of the defendant's behavior, is inadequate to justify departure. Id., at 1233.

As such, petitioner respectfully submits that not only is Fuentes readily distinguishable on its facts, it also appears that Fuentes would not withstand the scrutiny of the Ninth Circuit in its analysis of the Guidelines and further supports appellants

argument that he was illegally sentenced.

(d) The district court failed to consider appellant's ability to pay a fine

The Guidelines specifically require the District Court to consider the ability of the defendant to pay the fine in light of his earning capacity and financial resources. United States Sentencing Commission, Guidelines Manual Section 5E4.2(d)(2) (hereinafter Guidelines); United States v. Seminole, 882 F.2d 441, 443 (9th Cir. 1989) (citing Guidelines 5E4.2 now redesignated 5E1.2). In Seminole, the Ninth Circuit held where the Sentencing Court did not articulate its findings concerning the defendant's ability to pay, the fine may be vacated.

> The record does not establish whether Seminole has the earning capacity to pay a fine after he is released from prison. Accordingly, imposition of the fine violated the Guidelines.

Id.

In the instant case, the record is void of any discussion of the appellant's ability to pay the fine imposed.

The language of Guidelines Section 5E1.2(d) is mandatory in that it provides that the Court shall consider certain factors. United States v. Walker, 900 F.2d 1201,1206 (8th Cir. 1990) citing United States v. Seminole, 882 F.2d 441, 443 (9th Cir. 1989. In Seminole, the Court found that where a fine is characterized as a reimbursement, virtually the same findings of the defendant's ability to pay must be made under 18 U.S.C. Section 3006A(f)(1982). The Court in Walker further stated "the sentencing Court must make specific findings on the record that demonstrate these factors were considered before any fine may be imposed. United States v. Walker, 900 F.2d 1201,1206 (8th Cir. 1990).

In Walker, the Court noted that the Government argued that the presentence report

made the sentencing court cognizant on the defendants substantial wealth, and that his ability to pay could be inferred from his extravagant lifestyle. Id. at 1207. However, the Eighth Circuit rejected this argument and stated that given the defendant's assets valued at $21,000.00, his 20 year term, and his limited earning capacity based on his high school education, the defendant's ability to pay the fine was questionable. Id. at 1206,1207.

So too in this case, the appellant's presentence report reveals that he has worked in number of businesses, but has no particular job skill. Petitioner has only a partial college education, and no apparent job awaiting him when he is released. These factors are hardly indicative of an individual who may have the ability to pay a $6,250,000.00 fine. Moreover, in the instant case, the district court was aware of

questionable assets of the appellant and his unsuccessful efforts to secure marketable title to liquidate such assets.

(d) Petitioner was improperly denied a two level reduction for acceptance of responsibility

The privilege against self-incrimination applies throughout a defendant's federal sentencing proceeding. United States v. Berberian, 767 F.2d 1324, 1326-27 (9th Cir. 1985). The constitutional protections of the Fifth Amendment express the basic concept that "our accusatory system of criminal justice demands that the Government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460 (1966).

The Ninth Circuit has recently held that Section 3E1.1 is not unconstitutional on its face. United States v. Watt, 910 F.2d 587 (9th

Cir. 1990). However, an "improper application of the commentary to section 3E1.1 to pre-plea conduct could impinge on an accused's assertion of his constitutional rights." Id., at 591.

> For example, application notes 1(c), voluntary and truthful admission to authorities of involvement in the offense and related conduct", 1(d), "voluntary surrender to authorities promptly after commission of the offense", and 1(e), "voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense,", are in tension with the fifth amendment right against self-incrimination and sixth amendment right to counsel. (emphasis added)

Id., at 591.

In Watt, the probation officer recommended that the defendant not receive a two-point reduction for acceptance of responsibility based on the following findings contained in the presentence report.

1. At the time of the arrest, the defendant requested an attorney and would

provide no statements.

2. According to the FBI agent, he did not cooperate during the course of the investigation.

3. The defendant did not assist in recovery of monies, and there was no effort by defendant to make voluntary restitution.

4. The granting of a reduction for acceptance of responsibility based solely on defendant's entry of guilty plea would be contrary to the guidelines. Id., at 588-599.

The probation officer in Watt concluded that he was "unable to discern any actions taken by the defendant prior to the entry of plea which would result in a reduction." Id. The District Court, in that case, apparently concurred with the presentence report and stated that the defendant did not voluntarily surrender, or offer his assistance to the authorities in recovering the fruits and instrumentalities of his crime, and thus,

refused to apply the two-point reduction. Id.

The Ninth Circuit, held that the District Court erred in concluding that Watt's failure to assist in the recovery of the fruits and instrumentalities of the crime and "counts against him". Id., at 8761. The Court in Watt held:

> (a)ssisting in the recovery of the fruits and instrumentalities of a crime involves a waiver of fifth amendment rights penalizing a defendant for failing to provide evidence against himself or to make incriminating statements violates his constitutionally protected rights.

Id., at 593.

The facts of the instant case are similar to the facts of Watt in many ways. The probation officer, in the presentence report, stated the following in support of his recommendation to deny a two-point reduction.

> Upon advice of counsel, the defendant declined to discuss the circumstances of the instant offense. The "agreed statement of the facts in connection with guilty

> plea" filed in this case reflects the defendant admits conduct relating to the importation of marijuana, but it is unknown "if the defendant clearly demonstrates a recognition of and affirmative acceptance of personal responsibility for his criminal conduct" as specified in Section 3E1.1.

Just as the presentence report in Watt relied on the appellant's action in exercising his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination, the presentence report in the instant case, supports a recommendation of a denial of the two-point reduction on rights that are constitutionally protected. Under Watt, appellant cannot be "penalized for his failure to provide incriminating evidence against him". As such, appellant respectfully requests that this Court vacate his sentence and remand with an order directing the District Court to grant a two-point reduction and direct the probation officer to eliminate

discussion of constitutionally protected conduct from the analysis for acceptance of responsibility from the presentence report.

Section 3E.1 of the Guidelines affords the defendant an opportunity to reduce the offense level by 2 levels, "if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense of conviction ..." Sentencing Guidelines, Chap. 3, Part E at 1.1. The probation officer suggests in the presentence report that appellant is not eligible for the two level reduction.

Petitioner respectfully submits that discussing "circumstances" are not part of the criteria for determination of a 3E1.1 reduction. Moreover, the detailed stipulation of facts sufficiently covers the "circumstances of the instant offense".

Here, appellant submitted stipulated facts to the guilty plea which fully

established his recognition and acceptance of responsibility for the incidents which comprise the C.C.E. the offense of conviction. The appellant's statement is lengthy. It was also signed and stipulated by the Government. However, examples of affirmative statements which demonstrate the appellant's personal responsibility are respectfully brought to this Court's attention below.

> 1. (D)efendant specifically admits and acknowledges that between 1984 and 1988 he engaged in a continuing series of felony violations of Title 21, United States Code involving the importation of, and attempts and conspiracies to import, marijuana into the United States from Southeast Asia.
>
> 2. Defendant further admits that in the course of committing such violations he occupied a position of organizer, supervisor, or manager with respect to more than five other persons who were also involved in committing these violations and that as a result of this series of such violations he obtained substantial income and resources.

The appellant offered assets, local and abroad, to the Government. Moreover, appellant retained counsel, in Thailand, to seek civil relief against the parties who have refused to relinquish properties, on his behalf, to the United States Government, an act which is surely consistent with the recognition that he is responsible for the criminal activities for which he is accused.

In the instant case, the probation officer, in the pre-sentence report, dismissed appellant's effort to demonstrate his acceptance of responsibility. The value of the properties, that the appellant is making every effort to relinquish to the Government, has been estimated to be in excess of (10) million dollars. Petitioner respectfully submits that the Pre-sentence report applied a harsher standard, associated with Section 5K1.1 of the Guidelines, which allows the Court to depart from the guidelines for "substantial

assistance to authorities". Sentencing Guidelines, Chap. 5, Part K at 1.1.

Pursuant to Section 5K1.1, the Guidelines state that the appropriate reduction may be determined by the Court taking into consideration such factors as, "the Government's evaluation of the assistance rendered" and "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant". Id.

As such, appellant contends that the author of the probation report relied on inappropriate 5K1.1 factors for an "acceptance of responsibility" 2 level reduction in preparing the report. Further, the author apparently did not consider the proper factors of the Agreed Statements of Fact and the relevant factors in the Plea Agreement when formulating his recommendations.

Petitioner respectfully requests that this Court vacate his sentence and direct the

District Court to considerations which are appropriate under Section 3E1.1 to grant a two level reduction in the base level offense for acceptance of responsibility.

\ \ \

\ \ \

\ \ \

\ \ \

\ \ \

\ \ \

\ \ \

\ \ \

\ \ \

\ \ \

\ \ \

\ \ \

CONCLUSION

For the foregoing reasons, petitioner respectfully submits the petition for writ of certiorari should be granted.

Dated: 5-1-92

Respectfully submitted,

J. WILLIAM BEARD, JR.
Attorney for Petitioner
BRIAN PETER DANIELS

APPENDICES

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APPENDIX "A"

FILED

DEC 13 1991

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	
	)	Nos. 90-30415
Plaintiff-Appellee,	)	90-30432
	)	90-30433
v.	)	
	)	D.C. Nos.
BRIAN PETER DANIELS,	)	CR-90-00011-C
	)	CR-88-00189-JCC
Defendant-Appellant.	)	
	)	MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Submitted October 11, 1991**
Seattle, Washington

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges

Brian Peter Daniels appeals from the sentence imposed in related cases in which he pleaded guilty to conducting a continuing

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. 34(a); 9th Cir. R. 34-4.

suitable for decision without oral argument. Fed. R. App. 34(a); 9th Cir. R. 34-4.
criminal enterprise (CCE) in violation of 21 U.S.C. Section 848 and 853, and to conspiring to import marijuana, 21 U.S.C. Section 963,m aba distribute some 42 tons of marijuana in violation of 21 U.S.C Section 846. He argues that the district court erred in departing upwards and in computing his CCE sentence under the Sentencing Guidelines., refusing a two-point reduction for acceptance of responsibility, and imposing fines without determining Daniels' ability to pay. We affirm.

I

We apply three-part test for departures set out in United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991) (en banc). [1]

---

[1] This issue was briefed by reference to the five-step analysis adopted in United States v. Lira-Barraza, 897 F.2d 981 (9th Cir. 1990). Since then, we reconsidered Lira-Barraza en banc. Although we have now adopted a three-step analysis, that difference has no

Daniels argues that the district court did not properly identify its reasons or departing under United States v. Wells, 878 F.2d 1232 (9th Cir. 1989), and that he was erroneously sentenced under a base level of 39 instead of the base level of 32 set by the presentence report.

A

The district court adopted the findings in the presentence report, as it was entitled to do. See United States v. Pearson, 911 F.2d 186, 189 (9th Cir. 1990). The presentence report identified the extraordinary amount of marijuana involved, the scope of the

---

effect on this case.Under the new approach, we review de novo whether the district court identified and based its departure on a circumstance not adequately taken into account by the Commission; we review for clear error factual findings supporting the existence of the identified circumstances; and we determine whether the extent of departure is unreasonable in light of the standards and policies in the Sentencing Reform Act and the Guidelines. Lira-Barraza, 942 F.2d at 746-47.

enterprise, and the enormous profits made from the enterprise as factors warranting departure. The court added that Daniels, "unlike his codefendants, has amassed millions which are beyond the reach of the authorities." Unlike Wells, where the district court made only a conclusory statement explaining departure, these reasons are sufficiently specific to provide meaningful review.

B

By stipulation of counsel and as calculated in the presentence report, the base offense level on the CCE count was 32.[2] Daniels criminal history category was I. The applicable guideline range was 121 to 151 months. Accepting the presentence report's departure analysis, the district court

---

[2] The plea agreement provided that sentence on the other two cases were to be concurrent with the sentence imposed on the CCE conviction.

concluded that the appropriate sentence would be that corresponding to offense level 39 and criminal history category I. That range is 262 to 327 months. The district court selected 300 months for the reasons stated in the presentence report, and because Daniels had amassed millions of dollars worth of property beyond the reach of authorities.

The presentence report arrived at an offense level of 39 as the appropriate point for departure by comparing the amount of drugs related to level 32 and to level 43 under Section 2D1.5. The report reasoned that if level 43 were to apply, the amount of marijuana would have had to be 300,000 kilograms,whereas there were 195,048 kilograms, or roughly %65 of that, in this case. Interpolating, or taking 65% of the 11 point difference between a level 32 and level 43, the report came up with an offense level of 39.

Daniels first argues that "interpolation" cannot be a proper basis for departure in this case. He contends that the Guidelines only permit interpolation of specific offense characteristics and not base offense levels, see U.S.S.G. Sections 1A.4(b) (1987 version).[3] and that interpolating between Section 848(a) CCEs and CCEs under Section 848(b), which requires a the defendant to have been a principal in the organization, is like arriving at a logical midpoint between "apples

---

[3] Section 1A.4(b) explained "interpolation" under the guidelines as follows:

> A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the "serious" or the "simple" category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. U.S.S.G. Section 1A.4(b) (1987 version).

and oranges" because the two sections define different crimes. but the district court here did not interpolate between two offense to arrive at a total offense level; instead, it interpolated by analogy, to gauge the proper extent of departure from the total offense level. this means of calculation was not unreasonable in light of the standards and policies of the guidelines. See e.g., United States v. Carpenter, 914 F.2d 1131 (9th Cir. 1990) (upward departure based on possession of weapon arrived at by logical extension of other enhancements).

Daniels also argues that the court could not consider departing on the basis of the amount of marijuana involved because the applicable guideline already considers the amount as a means of raising the base offense level. He contends that Section 2D1.5 provides for an adjustment of base offense level to 43 if the overall weight of the

marijuana involved in the offense is over 300,000 kilograms.

The version of Section 2D1.5 in effect when Daniels committed his criminal conduct [4] consisted of three tiers, of which the lowest

---

[4] The 1987 version of section 2D1.5 provided:

> Continuing Criminal Enterprise
>
> (a) Base Offense Level:
>
> (1) 32, for the first conviction of engaging in a continuing criminal enterprise; or
>
> (2) 38, for the second or any subsequent conviction of engaging in a continuing criminal enterprise; or
>
> (3) 43, for engaging in a continuing criminal enterprise as the principal administrator, leader, or organizer, if either the amount of drugs involved was 30 times the minimum in the first paragraph (i.e., the test corresponding to Level 36) of the Drug Quantity table or 300 times the minimum in the third paragraph (i.e., the text corresponding to Level 32) or the principal received $10 million in gross receipts for any twelve-month period.

base offense level was for the first CEE conviction without limitation as to role or amount, U.S.S.G. Section 2D1.5(a)(1), and the highest was for engaging in a continuing criminal enterprise as the principal administrator, leader or organizer if either the amount of drugs was over 300,000 kilograms or the principal received $10 million in gross receipts for any twelve-month period. U.S.S.G. Section 2D1.5(a)(3). Subsection (a)(1) relates to 18 U.S.C. Section 848(a) (sic), for which one does not need to be a principal and for which there is no minimum narcotic requirement, whereas, (a)(3) parallels Section 848(b), which applies to principals who distribute at least 300,000 kilograms. Daniels was convicted un Section 848(a), and Section 2D1.5(a)(1) is therefore the applicable guideline. It does not take quantity into consideration.

Subsequent amendments to Section 2D1.5

indicate that the Sentencing Commission did not take drug amount into consideration in the 1987 version of subsection (a)(1). First amendments affective on October 15, 1988, raised the base offense level for CEE conviction to 36. The accompanying commentary stated that an upward departure would be warranted if the quantity of drugs involved "substantially exceeds that required for level 36 of the drug quantity table." At that time, for possession and other drug offenses under Section 2D1.1, 10,000 kilograms of marijuana was the minimum for level 36. Daniels's 200,000 kilograms of marijuana represents twenty time that amount. Next, the Commission revised section 2D1.5 again so that effective November 1, 1989, the base level for a CCE would be greater of 38 or "4 plus the offense level from Section 2D1.1 applicable to the underlying offense." Section 2D1.1 incorporates the Drug Quantity Table. Thus,

the sentence for CCE convictions now correlate directly to the amount of narcotics involved if that amount is greater than that for the level 36 minimum (otherwise, base level would simply be 38 under section 2D1.5(a)(2). The level 36 minimum for marijuana is 10,000 kilograms so that, if the new section 2D1.5 were in effect when Daniels committed his criminal conduct, he would have been subjected to a sliding scale for the amount of drugs involved in his enterprise.

Departure in this case is also consistent with other cases in which an upward departure was found warranted when the crime involved a large quantity of drugs and the offense guideline did not take drug quantity into account. See United States v. Bennett, 900 F.2d 204 (9th Cir. 1990) (affirming departure based on large quantity of drugs involved in

telephone count).[5]

Daniels's reliance on United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990), is misplaced. There, the sentencing court departed upwards in a Section 841(a)

---

[5] In United States v. Martinez, 946 F.2d 100 (9th Cir. 1991), we found improper an upward departure based on large drug quantity when the defendant was convicted of Section 846 conspiracy to distribute and Section 841(a)(1) possession with intent to distribute. The drug guidelines for these crimes make direct reference to the Drug Quantity Table, see U.S.S.G. Section 2D1.1, and the amount of drugs involved in the Martinez case was higher than the highest amount listed in the Table at the time.

The Martinez court found that the Sentencing Commission had already considered drug quantity for amounts greater than the highest amount in the Table, first, because the Section 2D1.1 Table considered drug quantity explicitly and, second, because the language in the Table accompanying the highest amount--"50 KG Cocaine or equivalent . . . (or more of any of the above)"--clearly indicated that higher amounts should be included at the highest level. Martinez 946 F.2d at 101-02.

Daniels's case is distinguishable because the Section 848(a)(1) CCE offense applicable to Daniels does not refer to the Drug Quantity Table, and because neither Section 2D1.5(a)(1) (1987 version) nor Section 848(a) mentions drug quantity.

possession case in part because of the large amount of drugs involved. Id. at 1498-99. The Fifth Circuit refused to sanction the departure, indicating that the Drug Quantity Table's separation into degrees of culpability already treated drug quantity in the possession contest. Id. at 1499. In CCE cases such as Daniels's, however, in which the defendant is not an administrator or leader of an enterprise dealing more than 300,000 kilograms, the 1987 Guidelines did not treat drug quantity using particular level. Instead, just as for telephone counts in Bennett, the 1987 CCE guidelines merely stated a flat level for the offense. Thus, Barbontin is distinguishable.

Daniels finally contends that by recommending an upward departure, the prosecution has somehow breached its plea agreement, thereby requiring us to order resentencing. This contention is without

merit, because the government expressly reserved the right to seek an upward departure in the plea agreement.

II

Daniels argues that the district court erred in two respects when it withheld a two-level reduction for acceptance of responsibility: it considered constitutionally protected conduct against Daniels, and it measured the evidence against a higher standard, akin to cooperation under Section 5K1.1, than that called for by Section 3E1.1.

A

Daniels suggests that the presentence report in this case relied on his action in exercising his sixth amendment right to counsel and his fifth amendment right against self-incrimination. He analogizes to the conduct of the probation officer held improper in United States v. Watt, 910 F.2d 587 (9th

Cir. 1990). He points to the presentence report's recommendation of denial of a two-point offense-level reduction, which indicated that Daniels declined to discuss the circumstances of the offense on advise of counsel and which stated that, even though Daniels admitted importing marijuana, it was unknown whether he clearly demonstrated recognition and affirmative acceptance of personal responsibility. Unlike Watt, where the court relied on the fact that the defendant, before entry of his guilty plea, had not surrendered voluntarily to authorities or assisted in recovery of the fruits and instrumentalities of his crime, id. at 593, the court here relied on insufficient manifestation of accepting responsibility after the plea. Nothing said in the presentence report impermissibly treads on Daniels fifth amendment privilege by not conferring credit on him for failing to

divulge information or take action that could incriminate him. Nor does it penalize Daniels for following the advice of his lawyer; the report's reference to his failure to discuss the case is simply by way of explaining why, apart from the agreed statement of facts, the probation officer lacked information that Daniels had demonstrated an affirmative acceptance of responsibility.

B

Daniels argues that the stipulated facts filed in connection with his plea establish recognition and acceptance of responsibility, and that his offer of assets to the government is consistent with recognition that he is responsible for the criminal activities for which he was convicted.

Acceptance of responsibility is a factual determination, and thus is reviewed for clear error. United States v. Gonzalez, 897 F.2d 1018, 1019 (9th Cir. 1990). The district

court's denying a reduction was not without foundation. There was evidence that Daniels pleaded guilty to certain charges, stipulated to certain facts relating to marijuana importation, and said he would try to retrieve assets to turn over to the government. On the other hand, there was evidence that Daniels refused to make a statement of financial condition to the presentence officer and had not assisted significantly in recovery assets. Under these circumstances we defer to the district court's determination, which we cannot say was clearly wrong. U.S.S.G. Section 3E1.1 cmt. 1; Gonzalez, 897 F.2d at 1019.

Daniels argues that the presentence report mistakenly applies the more stringent standard for substantial assistance to authorities, U.S.S.G. Section 5K1.1, rather than the standard for acceptance of responsibility. The presentence report in no

way refers to these standards, or to the kind of conduct that has to do with cooperation. Instead, it explicitly makes reference to Section 3E1.1 and applies the proper standard for acceptance of responsibility.

III

Daniels argues that the district court failed properly to consider his ability to pay a fine prior to imposing one in the amount of $6,250,000.00, contrary to U.S.S.G. Section 5E4.2(d)(2) (1987 version), and made no specific finding on ability to pay, contrary to United States v. Seminole, 882 F.2d 441 (9th Cir. 1989).

Daniels did not object to the $6,250,000 fine in his Objections to the Presentence Report and the Government Sentencing Memorandum, or at his sentencing hearing. We according review for plain error. See United States v. Lopez-Cavasos, 915 F.2d 474, 479 (9th Cir. 1990).

Section 5E4.2(c)(2)(C) (1987 version) authorizes the court to impose a fine on a defendant the maximum amount of which is three time the estimated gain to the defendant." Daniels admitted to making $5 million in 1987 from marijuana trafficking and $3 million for an individual marijuana shipment. Thus the $6,250,000 fine imposed by the district court is well under the maximum allowed by the statute.

The district court adopted the finding in the presentence report as amended by the stipulation of the parties. Paragraph 101 of the presentence report found that "[t]he defendant has substantial assets and has the ability to pay a fine if his Thailand assets are liquidated." Those assets were worth $10 million. In the sentencing stipulation, Daniels waived an evidentiary hearing with respect to paragraph 101 of the presentence report. Thus, the district court did not

plainly err in finding that Daniels owned $10 million in assets in Thailand and had the ability to pay a fine generally. Compare Seminole, 882 F.2d at 443 (requiring specific findings as to solvency where prosecution and defendant agreed defendant was indigent and where no facts supported defendant's solvency) with United States v. Quan-Guerra, 929 F.2d 1425, 1426-27 (9th Cir. 1991) (appearing to require remand for specific findings only when "the record is silent as to the defendants earning capacity").

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APPENDIX "B"

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRIAN PETER DANIELS, Defendant-Appellant.	)	Nos. 90-30415 90-30432 90-30433 D.C. Nos. CR-90-00011-C CR-88-00189-JCC ORDER

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has request a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 10 1990

CLERK, U.S. COURT OF APPEALS

APPENDIX "C"

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRIAN PETER DANIELS, Defendant-Appellant.	Nos. 90-30415 90-30432 90-30433 D.C. Nos. CR-90-00011-C CR-88-00340-JCC CR-88-189-JCC Western Washington (Seattle) ORDER

Appellant's motion to consolidate appeal Nos. 90-30415, 90-30432 and 90-30433 is granted. The opening brief remains due January 28, 1991. Appellee's brief is due February 27, 1991. The optional reply brief is due 14 days from service of the answering brief.

Appellant is reminded that a separate transcript designation must be filed for each appeal.

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

Adrienne H. Hickman
Deputy Clerk